

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| <b>STATE OF OKLAHOMA,</b>         | ) |                                    |
|                                   | ) |                                    |
| <b>Plaintiff,</b>                 | ) |                                    |
|                                   | ) |                                    |
| <b>v.</b>                         | ) | <b>Case No. 05-cv-329-GKF(PJC)</b> |
|                                   | ) |                                    |
| <b>TYSON FOODS, INC., et al.,</b> | ) |                                    |
|                                   | ) |                                    |
| <b>Defendants.</b>                | ) |                                    |

**STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF  
ITS MOTION IN LIMINE TO PRECLUDE EXPERT  
TESTIMONY OF DEFENDANTS' WITNESS VICTOR BIERMAN Ph.D.  
[DKT# 2063]**

Plaintiff, the State of Oklahoma ("the State") has moved, pursuant to Fed. R. Evid. 104 and 702, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for an order *in limine* precluding the expert testimony of Defendants' witness Victor Bierman, Ph.D. ("Dr. Bierman") regarding his testimony critiquing the State's expert witness Bernard Engel, Ph.D. ("Dr. Engel"). The State has advanced two grounds for exclusion in its *Daubert* motion.

First, the State urges that Dr. Bierman does not have expertise in the scientific discipline of watershed runoff and hydrologic/water quality modeling<sup>1</sup> ("Watershed Modeling") to support his opinions concerning Dr. Engel's work in that area. Defendants respond by arguing Dr. Bierman (1) was *part of a team* of experts that worked on a water quality analysis that included

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<sup>1</sup> Persons who are professionally engaged and active in their careers performing Watershed Modeling are typically members of the American Society of Agricultural and Biological Engineering (ASABE). The ASABE is the leading professional organization for watershed runoff and hydrologic/water quality modeling professionals. Peer reviewed papers of the Society are published in "Transactions of ASABE." "Applied Engineering in Agriculture" is another peer reviewed journal that the ASABE publishes. Dr. Bierman is not a member of this society. Based on his deposition he does not read these journals and has not published a paper on Watershed Modeling in these or any other scientific journal. *See* Exhibit A (Bierman Depo., 186:12-22, 191:5-22 & 282:1-283:2).

Watershed Modeling; (2) gained his experience in this discipline *while working on this case*; (3) has performed *similar* work in the past; and (4) is qualified to opine as to land use/land cover data and its interpretation because he trusts *his staff's work and interpretation of the data*. This “background” does not qualify Dr. Bierman as an expert in Watershed Modeling.

Second, the State urges that Dr. Bierman failed to perform any specific analysis or gather specific information to support his opinions. In response, Defendants contend that Dr. Bierman has performed a specific analysis to support his opinions because he: (1) toured the IRW, (2) read other people’s expert reports, and (3) has run a “sensitivity” analysis on Dr. Engel’s model. An analysis of these arguments serves only to further demonstrate Dr. Bierman’s lack of the knowledge and qualifications required to critique Dr. Engel’s work.<sup>2</sup> Furthermore, Defendants’ arguments are contradicted by Dr. Bierman’s deposition testimony.

## **I. Discussion**

### **A. Dr. Bierman lacks the requisite knowledge and experience to opine as an expert in Watershed Modeling.**

The Court must determine if the proffered expert is qualified by "knowledge, skill, experience, training, or education" to render an opinion. *See Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969 (10th Cir. 2001). While many Ph.D.s are qualified to be experts, it is important for a court to delineate exactly the discipline in which the person's expertise lies and whether this specific expertise supports the matters about which he / she proposes to testify. *See Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994), *cert.*

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<sup>2</sup> In fact, Defendants have moved to exclude Dr. Engel's analysis under *Daubert* based on the analysis and opinions provided by Dr. Bierman. *See* DKT #2056. As demonstrated by the State's response to that motion, *see* DKT #2157, the arguments proposed by Dr. Bierman are *prima facie* evidence that he is *not* an expert in Watershed Modeling; neither is he able to refer to any peer reviewed scientific papers or an actual analysis he performed to support his modeling critique.

*denied*, 513 U.S. 1111, 115 S. Ct. 902, (1995); *see also*, *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) ("To begin with, we agree with the district court that Dr. Curtis . . . easily qualifies as an expert under Federal Rule of Evidence 702. The real question is, *what is he an expert about?*") (emphasis added); *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 571 (2003), *rev'd in part on other grounds*, 407 F.3d 1352 (Fed. Cir. 2005). This Court has stated:

*Ralston* and like cases establish that the qualification of the proposed expert is to be assessed only after the specific matters he proposes to address have been identified. The controlling Tenth Circuit cases, exemplified by *Ralston*, establish that *the expert's qualifications must be both (i) adequate in a general, qualitative sense (i.e., "knowledge, skill, experience, training or education" as required by Rule 702) and (ii) specific to the matters he proposes to address as an expert.*

*In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1232 & 1245 (N.D. Okla. 2007)

(Emphasis added). Defendants' arguments fail to establish that Dr. Bierman has the requisite expertise in Watershed Modeling to offer opinions on Dr. Engel's IRW model.

To begin with, Dr. Bierman has already admitted that he has no previous hands-on experience in Watershed Modeling. *See*, DKT #2063, Ex. B (Bierman Depo. 16:10-13, 19:23 – 20:16, 22:1-21, 24:5 – 25:11, 30:25 - 31:9, 36:6-18, 45:8-12, 84:13-23, 110:19 – 111:14, 160:18 – 162:13, & 328:8-10) and Exhibit A (Bierman Depo. 282:1-283:2). Dr. Bierman has also plainly stated that he is not an expert in watershed hydrology. *See* DKT #2063, Ex. B (Bierman Depo. 80:16 – 81:10). And he is not a member of a professional society of watershed modelers and has not authored peer reviewed papers which used Watershed Modeling as an investigative tool. Dr. Bierman's *admitted* lack of knowledge and experience in these areas clearly disqualifies him as an expert in the area of Watershed Modeling and renders his opinions on Dr. Engel's Model unreliable and inadmissible.

In their response, Defendants first argue that Dr. Bierman has become an expert in watershed and runoff modeling through his review of two studies and being a part of a project team where others on the team did the Watershed Modeling. *See* DKT #2138, at fn 6. It is important to note that Dr. Bierman did not do the modeling in these instances. Rather he merely reviewed the studies for comment or worked with others on a project where other scientists actually performed the Watershed Modeling. Defendants' argument is misleading and overstates Dr. Bierman's experience. Dr. Bierman did not perform the Watershed Modeling in any of the referenced studies cited by Defendants. *See* DKT #2138, at p. 7 (describing Dr. Bierman's level of participation in several studies that involved modeling, and in none of which was he the modeler). While Dr. Bierman may have expertise in some areas of modeling, his opinions in this case do not address the types of modeling where he has experience and might have some expertise -- namely, in stream and in lake modeling. Much like the experts whose testimony was excluded in *Ralston* and *In re Williams*, Dr. Bierman is being offered to give opinions on subject matters where he lacks relevant expertise.

Second, in an attempt to overcome this admitted lack of expertise, Defendants argue that Dr. Bierman consulted studies, *after being retained*, which provided him the necessary expertise and knowledge of the IRW to opine on Dr. Engel's Watershed Modeling of the IRW. *See* DKT #2138, at p. 5. Defendants' argument misses the mark. Work to educate oneself in a complex scientific discipline *after* one is retained is not sufficient experience to qualify one as an expert, anymore than it is sufficient to qualify as an expert on the basis that Defendants have hired one to become one. That is particularly true in a field as complex as Watershed Modeling. The "expert" needs to come to the task with real expertise. Dr. Bierman clearly lacks such expertise.

Defendants next argue that since the “basic scientific principles” behind Dr. Engel’s model are *similar* to the basic scientific principles behind models Dr. Bierman is familiar with, he may critique Dr. Engel as an expert. *See* DKT #2138, at p. 6. The fact that the work involves similar basic principles is not enough; Dr. Bierman’s experience falls far short of the legal requirement of the specific knowledge required of an expert. *See In re Williams Sec. Litig.*, 496 F. Supp. 2d at 1232 & 1245 (the expert’s qualifications must be both (i) adequate in a general, qualitative sense (*i.e.*, “knowledge, skill, experience, training or education” as required by Rule 702) and (ii) specific to the matters he proposes to address as an expert.).<sup>3</sup> Second, Defendants admit that Dr. Bierman is not an expert in hydrology, rather that he merely possesses, “knowledge of hydrology.” *See* DKT #2138, at p. 6. Yet they contend that this general knowledge alone qualifies him as an expert in this case.

Despite Defendants’ arguments to the contrary, Dr. Bierman’s own testimony reveals his lack of experience with the specific type of Watershed Modeling performed by Dr. Engel:

Q How often have you worked with the GLEAMS model, not including this project?

A The GLEAMS model as a tool or the process-based deterministic mass balance science in GLEAMS?

Q No. I’m talking about the GLEAMS model as a tool.

A *Not before this project.*

Q What about the SWAT model; how often have you used that model as a tool?

A *I have not used SWAT.*

DKT #2063, Ex. B (Bierman Depo., 84:13-23); *see also, id.* (Bierman Depo. 160:18-161:16). It is clear from Dr. Bierman’s statements under oath that he possesses neither the general nor the specific knowledge and experience needed for him to opine in this case.

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<sup>3</sup> For example, knowledge of automobile engine mechanics does not qualify someone to opine on the cause of an airplane engine’s failure.

Finally, Defendants seek to support Dr. Bierman's critique of Dr. Engel's land use analysis by reference to the NLCD database, stating he trusts his employees who are familiar with the database and performed the work underlying his opinion. This is not enough. Dr. Bierman has admitted that he does not have experience in evaluation or use of land use/land cover data (NLCD):

Q Do you have experience in interpreting aerial photo such as presented in the NLCD dataset?

A I personally do not.

DKT #2063, Ex. B (Bierman Depo. 313:3-5). In the face of this admission Defendants claim that Dr. Bierman should still be allowed to critique Dr. Engel's use of the NLCD dataset. Defendants argue that experts may rely on others. *See* DKT #2138, at p. 12-13. The State does not contend that experts may not rely on others for facts or assistance with data analysis. *See* Fed. R. Evid. 703. However, what Defendants ask this Court to do in this instance goes beyond mere assistance; Defendants are asking the Court to impute knowledge and skills of Dr. Bierman's employees to Dr. Bierman -- specifically, skills and knowledge that he does not possess. The interpretation of the NLCD data was undertaken by staff who are not testifying at trial. Dr. Bierman even admits that he has no knowledge of the methods these staff members used to critique Dr. Engel's report. *See* DKT #2063, Ex. B (Bierman Depo. 317:19-318:1). Parroting the opinions formed by others who used methods that are not understood by the testifying "expert" is not sufficient. Dr. Bierman's inability to explain how his staff came to their conclusions reveals his obvious lack of expertise in this area and should render his testimony as to these opinions inadmissible.

**B. Defendants' new arguments that Dr. Bierman has now performed analysis or gathered specific information to support his opinions are false and not supported by the record**

Dr. Bierman has performed no analysis and gathered no specific information to support his opinions. For example, his deposition testimony revealed that he is not familiar with the particular circumstances and mechanistic processes in the IRW that affect the Watershed Modeling work performed by Dr. Engel in this case. *See* DKT #2063, Ex. B (Bierman Depo. 85:22-86:15). Dr. Bierman furthermore has admitted that he has not studied or gathered relevant data to support his critique of the modeling work performed by Dr. Engel. *See* DKT #2063, Ex. B (Bierman Depo. 56:10-57:6, 61:15-62:25, and 143:8-22 (no analysis of sources of phosphorus and bacteria), 57:24-59:2 (no modeling of IRW rivers or streams or Lake Tenkiller), and 196:2-7, 208:12-209:14, 213:16-214:24, 312:2-22, 319:25-320:15, 330:10-23, 383:19-385:20, 386:16-24, 390:2-393:8 (no testing or analysis to determine if his criticisms would result in a different modeling output), 85:22-86:15 (he and his team performed no field investigations of the IRW)). This record indicates his opinions lack reliable support.

Defendants, in response to the State's argument that Dr. Bierman has performed no analysis or gathered any specific information to support his opinions make three arguments. First, Defendants argue that Dr. Bierman's visit to the IRW constitutes a, "personal experience of studying or gathering data." *See* DKT #2138, at p. 4. Defendants miss the mark when they attempt to describe Dr. Bierman's short visit to the IRW as a scientific study:

In June of 2006, Dr. Bierman spent several days thoroughly touring the IRW. . . . took an aerial tour of the IRW . . . took a driving tour of the watershed . . . floated two separate sections of the Illinois River in Oklahoma.

*See* DKT #2138, at p. 5. No doubt this was an interesting couple of days. Dr. Bierman with no experience in Watershed Modeling, may have also found it to be informative. But, Defendants are stretching when they attempt to make it into something more. It is clear from his testimony that Defendants' claims that this visit establishes a basis for a claim that Dr. Bierman went about

a process of gathering modeling information is baseless. Contrary to Defendants' suggestions, Dr. Bierman has never claimed that he performed any sampling or hydrologic analysis during this brief visit.

Second, Defendants claim that simply by being hired as an expert and reviewing other expert reports in this case (including the State's expert reports), Dr. Bierman has gathered sufficient information to provide expert testimony on Watershed Modeling and to opine as to supposed errors in Dr. Engel's model. *See* DKT #2138, at p. 5. While it may be true that Dr. Bierman has advanced his knowledge through his work in this case, that does not mean he has gathered the specific information needed to test and support his opinions. It simply is not sufficient for a person who has not previously performed the complex task of Watershed Modeling to qualify as an expert merely on the basis of having read reports prepared by others. Such experience certainly does not qualify one to critique the work of others.

Lastly, Defendants' have reinvented Dr. Bierman's analysis in Section 3 of his report as a "sensitivity analysis" in order to claim that he did at least one test or analysis to support an opinion. Defendants claim that Dr. Bierman performed, "extensive sensitivity analyses" on Dr. Engel's models. *See* DKT #2138, at pp. 10-11. This statement is patently false and contradicts Dr. Bierman's report. He never describes his analysis as a sensitivity analysis in his report. *See* DKT #2138, Ex. 1 (Bierman Rpt. at pp. 29-31). Defendants have wrongly classified a part of Dr. Bierman's report as a sensitivity analysis to salvage their expert. What Dr. Bierman performed was an attempted *calibration* which is something entirely different than a modeling *sensitivity analysis*.<sup>4</sup> While Defendants may try to argue that Dr. Bierman has, in fact, validated his

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<sup>4</sup> Section D.5.1 of the EPA Guidance on Models document relied on by Defendants discusses model sensitivity analysis. *See* DKT #2138 Ex. 6 (U.S. EPA, Guidance on the



opinions through scientific testing in the calibration discussed in Section 3 of his report, this is simply not the case. His statements made under oath stand in sharp contrast to Defendants' claims. *See* DKT #2063, Ex. B (Bierman Depo. 56:16-57:1, 57:24-58:4, 61:15-18, 196:2-7). It is clear from Dr. Bierman's statements that despite Defendants' arguments to the contrary Dr. Bierman, in fact, performed no sensitivity analysis to confirm his opinions.

One simply cannot make the claim that Dr. Engel's model does not represent real world conditions without knowing what those real world conditions are. *See* DKT #2063, at pp. 6-8. Due to the fact that his opinions do not rest on specific relevant scientific facts or analysis, his testimony is revealed as a pure case of *ipse dixit* and must be excluded pursuant to *Daubert*.

## **II. Conclusion**

WHEREFORE, in light of the foregoing, this Court should enter an order *in limine* precluding Dr. Bierman from offering opinions on Watershed Modeling generally and Dr. Engel's IRW model specifically.

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Development, Evaluation, and Application of Environmental Models (2009) at p. 70). The discussion in this section does not include a calibration step during sensitivity analysis.

Respectfully Submitted,

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